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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. [redacted] 38

AXEL LANGNES, OWNER OF THE DIESEL HALIBUT VESSEL "ALOHA," HER ENGINES, ETC., PETITIONER

vs.

WINFIELD A. GREEN, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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(34,748)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 617

AXEL LANGNES, OWNER OF THE DIESEL HALIBUT VESSEL "ALOHA," HER ENGINES, ETC., PETITIONER

vs.

WINFIELD A. GREEN, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF FACTS

This court granted certiorari to review the decree of the Circuit Court dismissing, for want of jurisdiction, the petition of a ship owner to limit his liability under Section 4283 et seq, Revised Statutes; 46 U. S. C. A. Section 183.

The respondent commenced an action against the petitioner in the State Court, under the Merchant Marine Act of 1920, Sec. 33, Chap. 250; 41 Stat. at L. 988; U. S. C. A. Title 46, Sec. 688, alleging that while in the employ of the petitioner as a seaman and fisherman, he sustained injuries proximately caused by the *personal* negligence of the petitioner and defective appliances and equipment of his halibut vessel "Aloha."

The petitioner appeared in said common law action and filed an answer therein denying the allegations of negligence, and pleading two affirmative defenses: assumed risk and contributory negligence. The affirmative matters of the petitioner's answer were controverted by the respondent's reply, and the case thereupon being at issue the respondent demanded a jury trial and the cause was assigned for trial for the 6th day of February, 1928. Thereafter on the 4th day of February, 1928, two days before the trial date, the petitioner instituted this proceeding in the District Court, and an injunction thereupon is-

sued restraining the further prosecution of said action in the State Court. The monition of the District Court, which followed, was in the usual form directing all claimants to appear and file their claims, if any they have, on or before a day certain at the office of the United States Commissioner. The time for filing claims having expired, the Commissioner reported to the District Court that the only claim filed was that of Winfield A. Green, the respondent here (R. 19), and thereupon an order of default was entered against all other claimants. (R. 33.)

The claimant thereupon moved to dissolve the restraining order and to dismiss the petition on the ground that the petitioner was the sole owner of the vessel "Aloha" and there was only one possible claimant. (R. 19.) The District Court denied the motion, allowing an exception (R. 35); and thereafter the respondent filed an answer to the petition denying the material allegations thereof and alleging among other things that his accident and injury was the proximate

result of the *petitioner's personal negligence and with his actual knowledge and privity.* (R. 37, 39, 41.)

After the cause had been assigned for trial, and before the hearing, the respondent filed written exceptions to the petition on the grounds that the facts averred therein were insufficient to entitle the petitioner to a limitation of his liability and that the petition showed on its face that the District Court was without jurisdiction. (R. 36.)

The petition to limit liabilitty and for exemption from all liability was in the customary form except for one notable omission, viz.: THE PETITION CONTAINED NO ALLEGATION THAT THE PETITIONER WAS "*WITHOUT PRIVITY OR KNOWLEDGE*" OF THE FACTS UPON WHICH LIABILITY WAS PREDICATED.

This omission was not inadvertent, for the petitioner, Axel Langnes, was admittedly the sole

owner and master of the "Aloha," and the situation then and there alleged to support liability was of his own making. He was privy to and had personal knowledge of every essential fact and circumstance upon which liability was predicated. (R. 57-64.) He could not, with any regard for the truth, have alleged to the contrary and therefore did not attempt to do so. The District Court overruled exceptions to the petititon and proceeded to hear the evidence. (R. 47.)

The petitioner, Captain Langness, thereupon took the stand as a witntess in his own behalf and testified substantially as follows, *touching his right to a limitation of liability*:

> I am the sole owner of the diesel halibut vessel "Aloha" which is 52 feet long and weighs 28 tons gross. At the time of the accident in question she carried a crew of five men, including myself. The accident to Winfield A. Green, the claimant, occurred on May 13, 1927, and as a result, Green commenced an action in the State Court seeking to recover the sum of Twenty-five Thousand Dollars ($25,000.00) damages for the loss of his eye. The "Aloha," at the time of the accident, was seaworthy in every respect. *I was captain and master of the vessel and on board when the accident occurred. The fishing was done under my personal direction. I*

instructed the men how to handle the fishing gear and where and when to fish. I was personally present when the accident to Green occurred and saw it. Green was in the performance of his duties when he was injured. While he was hauling in the ground line, one of the hooks caught in the side of the vessel and sprung back, striking him in the eye. *Before the accident a portion of the side of the vessel from which the fishing was done, was covered with sheet iron plate to keep the hooks from catching in the side of the vessel, and after the accident the sheet iron plate was extended to cover the back stay irons which were along the side of the vessel in the vicinity of the roller, to keep the hooks from catching on them when the ground line was hauled in.* (R. 49-64.)

The petitioner thereupon rested his case as to his right to a limitation of liability, and thereupon the respondent moved to dismiss the petition on the ground that the evidence failed to show that the matters upon which liability was predicated, were without the privity or knowledge of the petitioner, but that on the contrary, the evidence was conclusive, that the petitioner was privy to and had actual knowledge of said matters. (R. 66.) *The District Court refused to hear argument on the motion and ruled that he would first determine the question of general*

liability and required the respondent to prove the merits of his claim, to which ruling the respondent excepted and exception was allowed. (R. 66-67.)

The respondent thereupon took the stand as a witness in his own behalf and testified substantially as follows, touching the merits of his claim:

> I was employed by Captain Langness for a fishing voyage, and our compensation was determined by the size of the catch. I was employed as an engineer and fisherman. On the second day after we commenced fishing, May 13, 1927, I was injured. *The hooks were repeatedly catching on the back stay or chain irons, which were located close to the roller over which the ground line was hauled in. I complained to Captain Langness, telling him that I was afraid of the back stay irons, which were not covered with anything to prevent the hooks from catching on them.* (R. 73, 75.) In response to my complaint, Captain Langness said it was all right—to use both hands in hauling in the gangions to which the hooks were attached and to pull hard so as to get plenty of slack. (R. 74.) In obedience to the captain's order, I began forcing and pulling harder on the gangions. Before I adopted this method the hooks had caught when the gangions were half way over the roller, but the one that injured me caught when it was only one-third of the way over the roller. (R. 76.) At that time,

Captain Langness was not heading the vessel so as to keep the line aft. It was coming up over the roller forward; that is, from the direction of the back stay irons upon which the hooks had been catching. (R. 77.) If the vessel had been headed in a direction so as to keep the ground line aft, there would be less danger of the hooks catching on the back stay irons. (R. 77.) A hook caught on the side of the vessel in the direction of the back stay irons and when torn loose by the power winch, sprung back and struck me in the eye before I could jump out of the way. (R. 76, 78.) I examined the hook when it was removed from my eye and it had been sprung about one-quarter of an inch. (R. 78.) I also examined the back stay irons upon which the hooks were continually catching and found that they had been gouged and cut up by the hooks. (R. 101.) I have been in the halibut fishing business for about twenty years, and in my experience it is customary to cover the side of the vessel from which the fishing is done with an iron or zinc plate to keep the hooks from catching and springing back into the faces of the fishermen. (R. 75-76.) I didn't know that these irons had not been covered by such a sheet metal before we started fishing. (R. 102.)

Upon the conclusion of the respondent's evidence, the petitioner challenged its sufficiency on the question of total exemption (R. 138), and the respondent renewed his motion as to the pe-

titioner's right to limit liability. (R. 138-139.) The Court ruled again that he would first determine the quetsion of liability on the merits, and, finding none, dismissed the claim, *utterly ignoring the basic jurisdictional requirement that, in order to maintain such a proceeding, the petitioner shall be without privity or knowledge of the essential facts upon which liability is alleged to exist.* (R. 139.)

The Questions Presented

On appeal to the Circuit Court the claimant, Green, raised two questions:

> First: When a seaman has commenced an action against the owner of a vessel in the State Court, pursuant to Section 33 of the Merchant Marine Act of 1920, to recover damages for personal injuries, *and there is only one possible claimant and a single owner*, must the owner, if he desires to take advantage of the Limited Liability Act, do so by proper pleading in his answer to the complaint, or may he elect to institute an independent proceeding in a Court of Admiralty and thereby deprive the seaman of his right to trial by jury?
>
> Second: May a ship owner avail himself of the Limited Liability Statute when the

> matters and circumstances upon which liability is alleged to exist, are *with* the actual privity and knowledge of the owner?

The Circuit Court decided the first question against respondent's contention, holding that a ship owner was not obliged to take advantage of the Limited Liability Act by way of an answer to the respondent's action in the State Court, but had a right to file a libel in the United States District Court, *even though there be but one possible claimant and a single owner.*

On the second question, however, the Circuit Court agreed with respondent, that over his objection, the District Court had no jurisdiction to proceed when it appeared that the owner was personally present at the time of the accident and had full knowledge of the facts and defective condition of the ship upon which the claimant's charge of negligence was based. On this point the Circuit Court held:

> "There is, therefore, no basis for the limitation of the liability of the owner upon a claim of negligence based upon the failure to cover the chain plates with sheet metal because of his ignorance, for he had full knowledge thereof. That being true the Court had no jurisdiction to proceed and pass upon the

> merits of the case or to determine whether or not such failure was negligence, in the absence of the consent of the injured party, who had elected to bring his action at law in the Superior Court of the State of Washington and who made timely objection to the trial of the question of negligence, contributory negligence and assumed risk, and other defenses. The objection of the appellant to the jurisdiction of the Court should have been sustained and the Court should have declined to pass upon the merits of the appellant's claim. Upon ascertaining that the owner was charged with knowledge and privity the proceedings should have been dismissed for lack of jurisdiction and the appellant allowed to proceed in the state court." (Opinion, R. 180-181.)

In this court the petitioner now claims that the foregoing holding of the Circuit Court was error. In his brief he urges five specifications of error, all of which relate to this single question. In the following brief we will not attempt to argue separately each "erorr" as specified by the petitioner, but, because they all relate to the same question we will argue them together.

Inasmuch as the entire record is before this court for review we will also argue under Subdivision II of the following brief, the first ques-

tion hereinabove stated which was decided by the Circuit Court adversely to the respondent's contention.

ARGUMENT

I.

The evidence being undisputed that respondent's injury occurred with the "privity and knowledge" of the owner, the District Court had no jurisdiction to adjudicate the merits of the claim.

The petitioner failed to plead or prove that the facts and matters relied upon by the claimant to establish liability, were without his "privity or knowledge," and in the absence of such allegations and proof he is not entitled to a limitation of liability under the express terms of the statute, and the District Court was therefore without jurisdiction to adjudicate the merits of respondent's claim. It is well settled that the District Court will first determine whether or not the ship-owner is entitled to a limitation of his liability and that this depends upon whether or not the matters upon which liability is alleged to exist were without his "privity or knowledge." If the Court finds that the owner is entitled to a

limitation of his liability, which is a finding that the Court has *jurisdiction* of the cause, it will then proceed to determine the question of general liability. But if the evidence shows that the facts and matters out of which the accident or disaster arose, were *with* the "privity or knowledge" of the owner, the owner is not entitled to a limitation of his liability and the Court is without jurisdictiton to go further and determine the merits of the claim.

In *Quinlan vs. Pew*, 56 Fed. 111 (C. C. A. 1st), the Court said, at page 114:

> "If the owners are not entitled to a limitation of liability as against Quinlan, then, inasmuch as the only claim appearing is his, they must be reversed. We understand that the expressions in Butler vs. Steamship Co., 130 U. S. 527, 552, 9 Sup. Ct. Rep. 612, are not inconsistent with this proposition, and that they merely hold that a District Court has jurisdiction to entertain a cause for limited liability for the very purpose of examining whether or not the misfortune was without the privity or knowledge of the owner. It seems to us that, if the District Court finds they are not entitled to the benefit of the statute, it has no power to bar the claimant from any portion of his demand, and, especially when there is no other apparent claim,

> the proceeding must be dismissed, to enable him to prosecute the owners in such tribunal as he may justly elect. This conclusion is recognized by Admiralty Rule 54, providing that owners claiming a limitation of liability may file a libel or petition setting forth the facts and circumstances on which such limitation is claimed."

And on page 121, it is further said:

> "Therefore, we hold that the owners of this vessel are entitled to a decree limiting their liability, *so that the District Court had jurisdiction to adjudicate the merits of appellant's claim.*" (Italics ours.)

In *Weisshaar vs. Kimball S. S. Co.*, 128 Fed. 397 (C. C. A. 9th), *Certiarari denied*, 194 U. S. 638, 48 L. Ed. 1162, the Court said at page 401:

> "The limitation of liability provided for by the statute under which the present proceedings were had, is, according to its express terms, to be allowed only when the loss, damage, or injury occurs 'without the privity or knowledge' of the owner."

And finding that the facts and matters upon which the common-law claimant predicated liability were not "without the privity or knowledge" of the owner, the Court reversed the judg-

ment of the District Court dismissing the claim, and remanded the cause,

> "with directions to the Court below to dismiss the petition at petitioner's cost, leaving the administratrix of the estate of the deceased, Weisshaar, at liberty to pursue her action for damages in the State Court."

In *Parsons vs. Empire Transp. Co.*, 111 Fed. 202, *Certiorari denied*, 183 U. S. 699, 46 L. Ed. 396, the same Court, in reversing a judgment of the District Court with directions to deny a petition for limitation of liability, said:

> "It was not the intention of Congress, by the provisions of Sections 4283-4285 of the Revised Statutes, embodying provisions of the Act of March 3, 1851, nor of any act amendatory thereof, to relieve ship-owners of responsibility for their own willful or negligent acts. (Citing numerous cases.)"

In the *Erie Lighter 108*, 250 Fed. 490, the Court said, at page 493:

> "It is necessary, primarily, to determine whether the petitioner is entitled to limit its liability. If it is, this Court may undoubtedly proceed to determine whether it is liable at all, and, if so, to fix and assess the damages that should be awarded the claimant. That is what the Supreme Court rules sought to accomplish. (Citing cases.) *On the other*

hand, if the petitioner may not avail itself of the limited liability statutes, it would seem, both on authority and reason that, at least without claimant's consent, this Court is without jurisdiction to proceed further, but must dismiss the proceeding leaving the claimant free to pursue his remedy in the Courts of New Jersey. It was expressly so held by the Circuit Court of Appeals of the First Circuit in Quinlan vs. Pew, 56 Fed. 111, 5 C. C. A. 438. Such also is the necessary conclusion to be drawn from the disposition which was made of such proceedings, when the owners were held not to be entitled to limit their liability, in Weisshaar vs. Kimball S. S. Co., 128 Fed. 398, 63 C. C. A. 139, 65 L. R. A. 84 (C. C. A. 9th Cir.); Parsons vs. Empire Transp. Co., 111 Fed. 202, 49 C. C. A. 302 (C. C. A. 9th Cir.); in Re Myers Excursion & Navigation Co. (D. C. S. D. N. Y.) 57 Fed. 240, affirmed subnom. The Republic, 61 Fed. 109, 9 C. C. A. 386 (C. C. A. 2d Cir.). * * * *The only ground for an owner to come into Admiralty is because of his asserted right to limit his liability. If it is found that he is not entitled to that right, for the Court to go further and determine general liability, etc., would be to deprive a claimant of the choice of forums given to him by the statute and deprive him of his right to trial by jury.*" (Italics ours.)

The foregoing authorities conclusively establish the right of a claimant to have the merits of his claim determined by a jury in a common-law

Court, at his election, unless the ship-owner pleads and proves in a Court of Admiralty that the matters upon which the claimant relies to establish his claim were without his "privity or knowledge."

In the case at bar, the District Court refused to consider and determine the right of the petitioner to a limitation of his liability which was challenged by the respondent, but held that he would first determine whether there was any liability at all, and finding none dismissed the claim. (R. 139, 145.) The District Court also found and held that the claimant assumed the risk and was guilty of contributory negligence. (R. 141, 144, 147.) These issues, we submit, the claimant was entitled to have determined by a jury who may well disagree with the findings of the learned District Judge. To hold that the District Court may first examine the merits of the claim to determine whether any liability exists at all before determining the jurisdictional question of the owner's right to limit his liability, would necessarily operate to deprive a seaman of a common law remery and a jury trial in every case. The rights

given to him by the Judiciary Act of 1789 and the Merchant Marine Act of 1920 would become a mere mockery.

The petitioner's own testimony showed, without controversy, that the work which the claimant was engaged in at the time of his injury, was being done under the personal direction of the sole owner of the ship, that he was present at the moment of the accident and saw it, and knew the cause of and manner in which it occurred. Under these circumstances it cannot be said that the injury was without the "privity or knowledge" of the owner, and it follows that he was not entitled to a limitation of his liability, and the Court was therefore without jurisdiction to entertain the proceeding, over respondent's objection.

Authorities Relied Upon by the Petitioner

In his brief the petitioner cites numerous cases, (without discussion) which he claims support his contention, but none of them are even remotely in point, and for this reason we also pass them by without further comment.

Two recent decisions of this Court are chiefly relied upon by the petitioner who claims they are in conflict with the opinion of the Circuit Court of Appeals in the case at bar:

> *Hartford Accident & Indemnity Co. vs. Southern Pacific Co.*, 273 U. S. 207; 71 L. Ed. 612;
>
> *The Edward, In Re East River Towing Co., Inc.*, 266 U. S. 355; 69 L. Ed. 324.

The petitioner quotes from *Hartford Accident & Indemnity Co. vs. Southern Pacific Co.*, certain language which, when considered apart from the facts involved therein, lends support to his contention. The case is, however, plainly distinguishable on the facts and the distinction is clearly pointed out by the court below in the following language:

> "The opinion of the Supreme Court of the United States delivered by Chief Justice Taft in Hartford Accident Co. vs. Sou. Pac., 273 U. S. 207, apparently was relied upon by the lower court in the procedure and disposition made of this case. That case follows Providence S. S. Co. vs. Hill, 109 U. S. 578, supra, with relation to the order of proof, as follows:
>
> "'* * * it shall be determined, first, whether the owner and his vessel are liable

at all; second, whether the owner may avoid all liability except that of the vessel and pending freight; third, what the amount of the just claims are, and, fourth, how the fund in court should be divided between the claimants.'

"The question under consideration by the Supreme Court in Hartford Accident Co. vs. Sou. Pacific, supra, was whether after the determination by the trial court that the injury arose with the knowledge and privity of the owner, and that consequently it was not a proper case for the limitation of the ship owner's liability to the value of the ship, it was the duty of the Court to grant the petitioner's motion to dismiss the petition for lack of jurisdiction to proceed further notwithstanding the opposition of the claimants to such dismissal, and their desire to have the merits of their claims adjudicated in the admiralty court; or whether the Court, notwithstanding its finding that the accident was with the privity and knowledge of the owner, and notwithstanding the motion of the petitioner to dismiss his petition, should proceed to determine the merits of the controversy. It was held that the court under such circumstances should retain jurisdiction of the case and adjudicate the validity of the claims. *The difference between that case and the case at bar is that the Supreme Court was there considering a case in which the claimants invoked the jurisdiction of the Court to adjudicate their claims in the admiralty court after they had been brought*

> *into that court at the instance of the ship owners, while in the case at bar the claimant is objecting to the jurisdiction of the admiralty court and insisting upon his right to proceed at law.* Inasmuch as the right to determine whether or not the claimant's rights should be adjudicated in admiralty or at common law lies with the claimant (Plamals vs. S. S. 'Pinar Del Rio,' etc., 277 U. S. 151), and not with the Court, the decision in Hartford Accident Co. vs. Sou. Pacific is not at variance with the view that we take concerning the rights of the appellant." (R. 184, 185.) (Italics ours.)

In the *Edward, In Re East River Towing Co., Inc.*, 266 U. S. 355; 69 L. Ed. 324, *supra*, an explosion aboard a tug belonging to the East River Towing Co. caused the death of her Captain, Thomas McCafferty, and other members of her crew. The administratrix of McCafferty brought suit against the company in the Supreme Court of New York, and thereupon the company filed a petition for limitation of liability in the District Court of the United States. The second circuit certified two questions to this Court:

> "(1) If an action at law be brought such as is described in Merchant Marine Act 1920, Section 33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?"

> "(2) Has the Merchant Marine Act 1920, Section 33, impliedly repealed the statute regarding limitation of liability of ship owners so far as claims or suits based on personal injuries to or death of seamen are concerned?"

This Court answered question (1) in the affirmaitve and question (2) in the negative, and nothing more was decided. The question of "privity or knowledge" of the owner was not involved, nor was it mentioned by the Court. It is therefore difficult to follow counsel's argument on page 29 of the petitioner's brief to the effect that the decision of the Circuit Court "is squarely in conflict with the decision of this Court," in the cited case.

This Court has repeatedly said that the language used in an opinion is to be taken in connection with the facts of the case under consideration. Mr. Chief Justice Marshall first pronounced the rule in *Cohens vs. Virginia*, 6 Wheaton 264, as follows:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but

> ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In *Bramwell vs. United States Fidelity & Guaranty Co.*, 269 U. S. 483, 489, the Court said:

> "It is a rule of universal application that general expressions used in a Court's opinion are to be taken in connection with the case under consideration."

To the same effect see: *Pacific S. S. Co. vs. Peterson*, 73 L. Ed. 220, 223, and cases there cited.

The Court on the other hand has twice passed on the identical question presented, contrary to the petitioner's contention by denying certiorari in the following cases, from which we have quoted in the foregoing argument:

Weisshaar vs. Kimball S. S. Co., 128 Fed. 397, *certiorari denied*, 194 U. S. 638, 48 L. Ed. 1162, *supra;*

Parsons vs. Empire Transp. Co., 111 Fed. Fed. 202, *certiorari denied*, 183 U. S. 699, 46 L. Ed. 396, *supra.*

II.

When a seaman sues for personal injuries in the State Court and there is only one possible claimant and one owner, the advantage of the Limited Liability Act must be obtained by proper pleading in that Court and not by filing a petition in the United States District Court.

The petitioner recites in his petition filed in the District Court that he is the sole owner of the diesel Halibut Vessel "Aloha," (R. 2), and it is inconceivable that any other claim or claims than that of Winfield A. Green (the respondent) can possibly arise out of the accident in question. Moreover, the United States Commissioner with whom the monition directed that all claims be filed reported to the District Court that the only claim filed was that of respondent (R. 19), and thereupon an order of default was entered against all other claimants. (R. 33.) For these reasons the respondent moved to dissolve the restraining order and to dismiss the petition, thereby permitting him to prosecute his common law action in the State Court. (R. 19.) The District Court denied the motion (R. 35) and the Circuit Court affirmed this order in the opinion which is here for review. (R. 176.)

It is well settled that a defendant ship owner may set up the statutory limitation of liability as a defense, or a partial defense, to an action in the State Court; and when a suitor commences his action in the State Court, *and there is only one possible claimant and one owner*, the ship owner, if he desires to take advantage of the limited liability act, must do so by pleading the same in his answer and not by instituting an independent proceeding in a Court of Admiralty.

The Scotland, 105 U. S. 24, 24 L. Ed. 101;

Great Western, 118 U. S. 521, 30 L. Ed. 156;

Carlisle Packing Co. vs. Sandanger, 259 U. S. 255, 66 L. Ed. 927;

The Lotta, 150 Fed. 219;

Delaware River Ferry Company vs. Amos, 179 Fed. 756;

Loughlin vs. McCaulley, 40 Atlantic 1020;

The Eureka, 108 Fed. 672;

The Rosa, 53 Fed. 132.

In the *Scotland*, *supra*, the Court decided that

> "It was not necessary that the ship owner should surrender and transfer the ship in

> order to claim the benefit of the law. That is only one mode of relief. They may plead their immunity, and, if found in or confessing fault, may abide a decree against them for the value of the ship and freight, as found by the proofs."

In the *Great Western*, *supra*, it is said in the syllabus:

> "Limited liability may be claimed first merely by way of defense to an action; or, second, by surrendering the ship or paying her value in the Court. The latter method is only necessary when the ship owner desires to bring all the creditors claiming damages, into concourse and distribution."

In the *Sandanger* case, *supra*, the Court held (p. 260):

> "In a State Court, when there is only one possible claimant and one owner, the advantage of this section (Sec. 4283 of the Revised Statutes) may be obtained by proper pleading. The Lotta, 150 Fed. 219-222; Delaware River Ferry Co. vs. Amos, 179 Fed. 756."

In the *Lotta*, 150 Fed. 219, which is cited by this Court in support of the rule for which we contend, the Court refused to entertain a petition to limit liability, where there was only one possible claimant and one owner, and said:

> "All that petitioner can fairly claim is that he should not be subjected to a personal judgment for an indefinite amount and beyond the value of his interest in the Lotta and her freight. There is no reason to doubt that this proper defense may be availed of in the State Court, and if there is an ulterior purpose, the petitioner's object in invoking the jurisdiction of this Court, is to escape a jury trial and take the case away from the common-law jurisdiction, that purpose should receive no countenance here; for the act which gives this Court its Admiralty and Maritime jurisdiction saves to suitors in all cases the right of a common-law remedy where the common-law is competent to give it, and good faith requires that this proviso shall have its full and fair effect."

Although the right to a common-law remedy, with its attending jury trial, was reserved to *all* suitors by the judiciary act of 1789 (Sec. 563 Revised Statutes),

> "In ALL cases where the common-law is competent to give it,"

Congress in 1920 expressly declared in the Merchant Marine Act (Sec. 33) that:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action, for damages, at law with the right of trial by jury."

In view of this special declaration of Congress with respect to seamen, the claimant should not be deprived of his right to a common-law remedy and a jury trial, unless it clearly appears that it will be impossible for the petitioner to obtain the advantages of the limited liability statutes in the State Court. In the case at bar, when the claimant moved to dissolve the restraining order and dismiss the petition, it clearly appeared from the record that the petitioner is the sole owner of the vessel in question and that there is only one possible claim against it . No concourse or apportionment is required under these circumstances, and therefore the common-law Court is competent to give a full and complete remedy to both parties.

> "The statute is intended to limit the liability of the ship-owner, but not arbitrarily to give him a particular forum. * * * All that could be accomplished by appellant (petitioner), if successful on this petition, would be to avoid jury trials. It would be permitting it to try the case in another forum of its choice and this is unauthorized by the act."
>
> *The Aquitania*, 20 F. (2d) 457 (C. C. A. 2d).

It clearly appears that every protection and benefit which the petitioner may obtain in the Federal District Court is open to him in the State Court. His only reason for selecting the Federal forum is to avoid a jury trial, which plainly was not the purpose or intention of the Limited Liability Act.

In the recent case of *Hartford A. C. C. I. & Indemnity Company vs. Southern Pacific Company*, 71 Law. Ed. 464, Chief Justice Taft, referring to the objects and purposes of a proceeding such as the petitioner has here instituted, said:

> "The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy, and is applicable to a proceeding *in rem*, as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person."

Plainly, in the present case, there is no occasion for such a proceeding. Only one suit can possibly arise from the accident or "disaster" complained of. There is no "many cornered controversy" in-

volved requiring the administration of a court of equity. There is but a single claim and a single owner, under which circumstance, as pointed out by Judge Brown in *The Rosa*, 53 Fed. 132, and *The Eureka*, 108 Fed. 672, *supra*, a common-law court is competent to give a full and complete remedy:

> "The limitation of responsibility provided by law can be as fully and as readily secured in a common-law suit, as in this court, where there is but a single claim against the vessel, or her owners. All that is needed in either court, is an answer setting up the limitation of liability under section 4283 of the United States Revised Statutes, with a statement of the value of the owners' interest in the vessel and her freight pending. The question of value will then become one of the issues in the cause; but the determinaiton of such value is as appropriate and easy in the common-law suit as is the determination of ordinary questions of value in the usual course of common-law proceedings. To justify interference with the suitor's common-law remedy, therefore, the petition must show some needed relief against more than a single claim."

The Rosa, 53 Fed. 132, 133-135.

We are not unmindful of the decision of the Court in *White vs. Island Transportation Com-*

pany, 223 U. S. 58, holding that Courts of Admiralty have JURISDICTION to limit liability, even though there is but a single claim and a single owner. We do not question the *jurisdiction* of the District Court in such cases, nor the right of the ship-owner to take advantage of the limited liability act. Our only contention is that when a seaman elects to bring his action in the State Court, pursuant to Section 33 of the Merchant Marine Act of 1920, *and there is only one possible claimant and one owner*, the owner must move to limit his liability in that Court and cannot choose the Admiralty forum and thereby arbitrarily deprive the seaman of his right to a jury trial, which right is given to him by two different Acts of the Congress.

Carlisle Packing Co. vs. Sandanger, supra, is the only decision of the Court which touches the precise question at bar, and the holding therein in no manner militates against the decision in the *White* case. If, however, the holding of the Court in the *Sandanger* case can be construed to be in conflict with that in the *White* case, then, we believe, the *White* case must be deemed overruled,

for the reason that the *White* case was cited to the Court in the *Sandanger* case but was not mentioned in the opinion.

It is true, as stated by Judge Neterer in the *Salmon King*, 24 Fed. (2d) 555, that subsequently to the *White* decision, several of the inferior Federal Courts construed the language thereof to mean that, "whether there is a plurality of claims or only one," a ship-owner, to obtain the advantage of the limited liability act, must institute a special proceeding in a Court of Admiralty. The later decision of the Court in the *Sandanger* case, however, makes it plain that its holding in the *White* case was misinterpreted by those Courts.

It is respectfully submitted that the cases which we have cited (particularly the *Lotta* and *Delaware River Ferry Company vs. Amos*, *supra*, the reasoning of which was approved by this Court in the *Sandanger* case), conclusively demonstrate that there is no occasion for the proceeding which the petitioner instituted in the District Court; and that every advantage, privilege and benefit to which the petitioner is entitled under the Lim-

ited Liability Act can be obtained by proper pleading in the State Court, without depriving the respondent of his right to a jury trial.

CONCLUSION

In conclusion we respectfully submit:

(1) That the respondent's injury occurred with the "privity and knowledge" of the petitioner, and therefore the decree of the Circuit Court dismissing the proceedings for lack of jurisdiction should be affirmed.

(2) That in any event the petition to limit liability should be dismissed and the respondent be permitted to prosecute his action in the State Court for the reason that there is involved but one owner and only one possible claimant.

Respectfully submitted,

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